Introduction

Law and Legality in Modern Indian History

Alastair McClure and Saumya Saxena

In April 2016, twenty-six-year-old Shayara Bano from Uttarakhand, a northern state in India, alleged that her husband subjected her to much cruelty. He had taunted her for inadequate dowry, forced her into abortions, and eventually pronounced an arbitrary unilateral divorce, uttering the word *talaq* three times. Bano pleaded that the arbitrary divorce was pronounced without her consent and would force her into destitution.[1] Her husband, on the other hand, pleaded that "triple talaq," or *talaq-ul-bidat*, was not only valid, but the most common procedure for divorce between Muslims in India, which had repeatedly been upheld by the Indian courts.[2]

Invoking her right to "delegated divorce" (*talaq-e-tawfid*) if her husband contracted a second marriage, Latifannesa Bibi similarly uttered the word *talaq* three times, divorcing her husband in 1919.[3] While bigamy historically has been accepted as a valid practice in Islamic law as practiced in India, in Latifannesa's case, she and her husband had signed a contract (*Kabin-nama*) after their marriage. The contract provided conditions for an absolute right of unilateral divorce to the wife, a clause that their original marriage contract (*Nikahnama*) did not contain. The Calcutta High Court upheld her right to unilaterally divorce her husband.

While both deployed the same procedure for instant divorce, the difference between the two cases was not merely that of husband in the former example and wife in the latter. Rather, with a century separating the cases, which had seen some aspects of Muslim personal law codified and then further amended, women's right to unilateral divorce had gradually disappeared whereas men's right to such a divorce had become almost nonnegotiable. This 1919 precedent predated all formal legislations and statutory codes of Muslim personal law—the Sharia Application Act 1937, the Dissolution of Muslim Marriages Act 1939, and the Muslim Women's Protection of Rights on Divorce Act 1986, subsequent to which triple talaq has remained the monopoly of men.

These cases shed light on an intriguing intersection between formal and customary law, one that

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1. *Shayara Bano v. Union of India*, Writ Petition (Civil) No. 118 of 2016.

2. Shayara Bano's case was decided by the Supreme Court of India on August 22, 2017, and the practice of triple talaq set aside. The Law Commission was directed by the Government of India to contemplate a uniform civil code to replace the religious family laws. The Commission, however, recommended codification of personal law and piecemeal, targeted reforms instead of a common code.

3. *Sainuddin v. Latifannesa Bibi, (1919)* ILR 46 Calcutta 141.

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forces serious skepticism to any suggestion that the transition of practice, custom, or tradition to statute should be characterized as "progressive," as the Benthamite notion of "better laws make better societies" appears to suggest. Codification of law, which was central to the colonial civilizing mission and often masqueraded as a savior of women's rights in postcolonial India, was in fact barely distinguishable from the commandments of parallel religious jurisdictions (in fact, informal or formal nonstate religious contracts such as *Kabin-namas* sometimes offered more flexibility). Furthermore, the two cases of Shayara Bano and Latifannesa also reveal that the law—customary, personal, statutory, or a bit of all three—often found basis in contradicting notions of morality, and eventually all sought constitutional recognition or protection. Significantly, India's transition from a colony to a democracy did not entail a church-state separation. Instead what we notice is a cooperation or codependency between religion and the law, where the category of personal law became even more resilient. Everyday practices or customs in derogation of the state's law began to be codified into statutes as "personal law," enjoying constitutional protections as "fundamental rights." Thus, the separation of church and state was not necessarily a precondition for democracy.[4]

The range of political, social, cultural, and religious questions that arise from this small comparison offers a lens into the rich historical canvas that legal history can offer. This analytical richness partly explains the continued interest in the field across disciplines, while also pointing toward some of the key questions driving current scholarship. Tackling some of these, this special themed section aims to problematize not just the definition, but also the behavior, purpose, method, and consequence of law. Recognizing law within and beyond the realm of state law or formal law opens up new questions about the politics and process of lawmaking.

The Field

Given the wide net through which the various forms of law function, its position and role in modern Indian history has already produced a weighty corpus of scholarship.[5] The study of law has intrigued historians, lawyers, and anthropologists alike, and thus the field of modern Indian history has consistently emphasized the centrality of law. Aptly described by John Comaroff as a process of "lawfare," the application of colonial law undergirded colonial expansion across India from the eighteenth century onward.[6] The introduction of a modern "rule of law" not only acted as the justification for this violent expansion, but also operated as the predominant mechanism to order societies and consolidate rule.[7] Yet if the role of law holds a principally important place within historical scholarship, the remit of what constitutes the legal history of modern India remains unclear. In part a reflection of law's nebulous and historically contingent character, this interdisciplinary subset has traversed fields of historical interest and schools of historical thought. (Seminal contributions to the history of Indian law have for instance been produced from the divergent Cambridge, Chicago, and subaltern schools of thought.)[8] The diversity of this interdisciplinary project has, in the process, produced distinct subcategories of historiography from historians sharing specific scholarly interests. This is particularly true of scholars focused on questions relating to gender, violence, and criminality.[9] Such attention to distinctive topics within legal history, often understudied in their own right, has been useful in stimulating debate and reorienting the direction of research.[10]

4. Asad, *Formations of the Secular*; Chatterjee, *The Politics of the Governed*.

5. See Sharafi, "South Asian Legal History."

6. Comaroff, "Colonialism, Culture, and the Law." For an early essay on the role and importance of both formal and informal law in India, see Cohn, "Anthropological Notes."

7. For examples that have drawn out the interconnected histories of politics and law, see Mukherjee, *India in the Shadows*, and Singha, *A Despotism of Law*.

8. While by no means an exhaustive list, perhaps the most important examples of these are Washbrook, "Law, State, and Agrarian Society"; Cohn, *Colonialism and Its Forms of Knowledge*, 57–75; and Guha, "Chandra's Death."

9. The most recent legal-historical work on these topics includes Gangoli, *Indian Feminisms* (for gender); Condos, *The Insecurity State* (for violence); and Singha, "Punished by Surveillance" (for criminality).

10. Important edited collections and special issues that have produced close readings on various themes within law include, but are not limited to, Yang, *Crime and Criminality in British India*; Newbigin et al., "Personal Law, Identity Politics, and Civil Society"; Chatterjee, "Introduction: Postcolonial Legalism"; and Anagol and Grey, "Rethinking Gender and Justice."

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Similarly, a widening of methodological approaches to both law and history has had a productive impact on the way scholars have been able to approach legal-historical questions. In what marked a foundational essay in the interdisciplinary field, Upendra Baxi fulsomely praised the critical endeavor of the nascent Subaltern Studies school and its engagement with law. However, he also pushed the contributors to think more carefully about the pervasive ways in which law punctuated their history writing.[11] In what can be read as a partial response to these earlier provocations, scholars have worked hard to engage with the discipline from new vantage points. This work has included monograph-length studies on single court cases,[12] identity formation,[13] colonial violence,[14] the *panchayat*,[15] legal emergency,[16] the jury and judiciary,[17] and colonial categorization (civil and criminal[18] or personal and public[19]), among other subjects.

With this latest wave of scholarship, larger historical questions have begun to be rethought through law. The vexed issue of periodization and its relationship with law, for instance, though still an underexplored topic, has begun to bear fruit.[20] Taking examples such as the child bride in colonial India or those victimized under the Criminal Tribes Act in the transition to independence, legally informed historical studies increasingly impress the ways in which historical ruptures are tempered by legal, political, and social continuity.[21] As in the example of Shayara Bano with which this introduction began, this rupture becomes a recursive analytical relationship. Here, our understanding of the historical composition of law is reshaped in tandem with our grasp of the wider historical context in which law functioned.

Important in this diversification of historical approaches to the history of law has been the acceptance of legal pluralism as a methodological framework, as well as the subsequent sharpening of its employment historically. Simply put, legal pluralism is the notion that in almost all societies there exists various untidily defined, dialectical systems of law beyond the formal world of legislature.[22] In discussing an overemphasis on state law in British India, for instance, Mitra Sharafi has warned of the impact of what she terms a "codification fallacy." As she explains, an exaggerated role given to this form of law ignores its position as part of this larger plural legal system. Her study of the Parsi community, for example, shows that case law came before, after, and in the absence of state legislation.[23] Masaji Chiba's work on Sri Lanka is another example of this approach. Here he suggests a tripartite model of law that provides a valuable insight for understanding the state's dilemma in the codification of custom.[24] In Chiba's model, "official law" was not merely composed of law made by the state; it included all law-like rules, as well as precedents that find their basis in society or religion, that have been accepted by the state. Often the state features these rules as its own without an acknowledgment or even an awareness of their religious or regional influences.[25] A continued appreciation of law's historically plural nature may help us overcome the continued challenges presented by periodization, or even in dispelling

11. Baxi, "The Place of Law in Subaltern Studies," 252.

12. Mallampalli, *Race, Religion, and Law in Colonial India*; Purohit, *The Aga Khan Case*.

13. On the relationship between Parsi identity and law, see Sharafi, *Law and Identity*. On the relationship between law and Rajput identity, see Kasturi, *Embattled Identities*, 137–48.

14. Kolsky, *Colonial Justice*; Heath, "Torture."

15. Jaffe, *Ironies of Colonial Governance*.

16. Hussain, *Jurisprudence of Emergency*; Ghosh, *Gentlemanly Terrorists*.

17. Bayly, *Recovering Liberties*; Ramnath, "The Colonial Difference"; Sharafi, "The Semi-Autonomous Judge." The jury system was abolished in India in 1964. However, it was preserved under Parsi family law, which required a jury trial for divorces. This was challenged before the Supreme Court in November 2017. See "SC Seeks Centre's Response on Quashing Jury System for Divorce in Parsi Community," *Times of India*, December 1, 2017.

18. Benton, *Law and Colonial Cultures*; Nussbaum, "Sex Equality, Liberty, and Privacy."

19. Derrett, *Introduction to Modern Hindu Law*; Subramanian, *Nation and Family*.

20. Baxi, "Postcolonial Legality."

21. For the ways in which patriarchy should be understood beyond coarse ruptures of precolonial and colonial, see Sarkar, "Rhetoric against Age of Consent"; for colonial/postcolonial continuity in penal governance, see Brown, "Postcolonial Penality." See also Newbigin, *The Hindu Family*, for codification of Hindu law, women's right to property, and social legislation in postindependence India.

22. Merry, "Legal Pluralism."

23. Sharafi, *Law and Identity in Colonial South Asia*, 10.

24. Chiba, "Legal Pluralism in Sri Lankan Society."

25. Ibid.

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the imperial shadow over the discipline, which can lead historians to overemphasize specific colonial legislations or exceptional moments or events in history—concerns that are returned to in greater detail in various essays in this themed section.

Ironically, however, with a thriving field composed of countless historians who produce histories of law, there are significantly few who call themselves legal historians, a term more comfortably used by those in positions in law faculties. Moreover, in comparison to the more formative moments in the social, cultural, and gender history of South Asia, treated as its own subfield, the history of law in modern India has a more diffuse range of foundational texts. In what is still a developing field, the various branches of legal-historical interest thus at times appear to be growing in increasingly divergent directions. As aforementioned, the consolidation of distinctive groups of legal scholarship is important for collaborative work. However if it leads to isolation between particular fields of legal history it can act to the detriment of the field, restricting our ability to draw legal-historical parallels and connections, limiting the breadth of our analytical landscape.

In this sense this special section aims to disrupt this process productively, taking four essays that range in temporal and thematic scope but address overlapping questions and themes shared between differing approaches to legal historical scholarship. Connected centrally by an interest in the historical role of law but divergent in their frames of analysis, the essays seek to reassert the importance of reading these historical questions alongside one another. The special section does not necessarily seek to displace the significance of law within older historiographical debates, nor does it underplay the importance of careful thematic scholarship that elucidates more defined themes in law and history. It does, however, hope to helpfully bridge the emerging subcategories of legal history in India, reminding those engaged in the field of the benefits that refocusing on the primary questions of legal history can offer. In this light, the themed section acts as a critical reflection on the sophisticated methodological apparatus used by scholars in this field, as well as the veritable explosion of work published in legal history in recent years.

Finally, we hope to offer sustenance to productive shifts occurring in legal history within and beyond scholarship on modern India. As Brian Tamahana has noted, the rhetorical employment of an intellectually vague "rule of law" has now taken on truly global connotations in the modern world, reverberating across political, religious, historical, and geographical divisions.[26] While approaches to the contested and layered historical composition of law are markedly apparent in the colonial world and in religiously and ethnically diverse postcolonial nation-states, scholars have also recognized the presence of plural legal orders outside of these spaces.[27] Our embrace of the fundamentally convoluted nature of law and history, bringing together essays across time, analytical approaches, and themes, supports the constant reassessment of assumptions of singularity or coherence that may permeate the legal history of other spaces. It rather encourages further elucidation of what Thomas Duve has termed the "entanglements in legal history" and what Lauren Benton labels "rampant boundary crossing," processes inherent to both the legal history of India, but also to legal cultures and traditions that exist across national divides.[28] With India representing the largest and most diverse global democracy, producing a finer understanding of its legal history thus may in turn dent Eurocentric models of law and the normative assumptions these produce, which continue to dominate the broader field.

The Essays

The section begins with Upendra Baxi's methodological overview of legal history. Charting his own eminent career at the intersection of law, society, and history, Baxi notes that the shared appreciation of past events, evidence, and precedence has created an intimate, if at times fraught, relation-

26. Tamanaha, *On the Rule of Law*, 1–4.

27. The importance of understanding national legal histories in this context is perhaps most clearly articulated by Lauren Benton; see Benton, *Law and Colonial Cultures*, 1–30.

28. Duve, "Entanglements in Legal History"; Benton, *Law and Colonial Cultures*, 8.

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ship between law and history. Revisiting the theoretical and historiographical underpinnings of this pursuit, Baxi offers analysis of the multiple and coexisting histories of law. He draws out five distinctive strands: juridical history; social histories of law; studies of the materiality of law; conceptual histories of law; and what he describes as "stories of law's desire to be autonomous." In dividing the discipline into roughly separate forms, the essay then moves through a number of key sticking points that reappear throughout the field. These include analysis of issues such as the problematic idea of "personal law," the relationship between the agent and the structure, and, most prominently, the uncomfortable analytical effects that the imposition of strict periodization can cause. It is in the crux of problematic periodization that Baxi concludes the essay, returning full circle from his 1992 essay on the subaltern school.[29] He does this through an analysis of recent debates between Vivek Chibber and Partha Chatterjee that discuss the contemporary utility of the subaltern school methodology. While Chibber posits that the major driving force of historical change is the primacy of a universal globalizing drive to accumulate capital, in taking a legal perspective, Baxi asks whether it is appropriate to understand law as an empty instrument within this process. Rejecting this proposition, Baxi prompts historians and lawyers to think about these themes in more complex ways. Taking on the history of human rights, a notable absentee from Chibber's analysis, Baxi's essay points to the historical genealogies of these topics that lay beyond the traditional periodic markers of decolonization and global capitalism. For Baxi in this example, the genealogy of human rights stretches to anticolonial struggles that predate such markers.

From drawing out the larger questions and problems that might exist within legal history as method, as well as providing a thorough theoretical bibliography for future projects, this special section then takes three case studies from authors engaged to different degrees with prevalent themes in Indian legal history.

The first two essays analyze law in the period following the demise of Company rule, taking contrasting points of entry. Exploring the nature of imperial sovereignty, Alastair McClure's essay uses examples of large-scale mercy as a window into a more pervasive logic that grounded colonial law. The essay begins with an analysis of the pardon offered after the rebellion of 1857–58, the largest rebellion in nineteenth-century imperial history. While the pardon proclaimed to offer complete amnesty to the majority of rebels, the practice of colonial forgiveness was generally circumscribed, depending on the role each rebel played in the outbreak. Examining the process by which the practice of relative forgiveness and punishment was implemented across society, he identifies the Queen's Proclamation as a formative moment in the construction of a new colonial legal order in India. The essay then follows subsequent pardons at royal celebrations across the century. On these occasions, 10 percent of the prison population was released in honor of the imperial sovereign. In drawing out the relationship these spectacles of nominal forgiveness had with the everyday colonial legal regime, a number of themes prevalent in the historiography of crime and law reappear for further analysis. This is particularly the case for the figure of the infanticidal woman who, contrary to her difficult relationship with colonial law in the 1870s, was positioned as a particularly suitable recipient of clemency in these transient moments of royal spectacle. Through an analysis of the politics undergirding these events, McClure argues that to understand fully the way colonial law structured colonial violence, it is also important to understand the function and provision of mercy in this history.

In what is now a pointed criticism of the field, there has been somewhat of a saturation of state-centered histories of colonial law in the British Raj period. As such, McClure's rethinking of law and imperial sovereignty is accompanied by Leigh Denault's essay on the *panchayat* (village council), 1860–1917. While the state's-eye view tracks the *panchayat* across a relatively smooth nineteenth-century transition, inserted into the attempt to extend the influence of local governance, this essay alternatively shows the *panchayat* to be a dynamic

29. Baxi, "'The State's Emissary.'"

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space reimagined by Indian jurists and social reformers. Swimming against the historiographical current, Denault emphasizes the *panchayat* as a regionally diverse and at times intellectually liberal institution. She focuses on *panchayat* decisions to dissolve problematic marriages or legitimize remarriage that reached the High Court for adjudication, showing that as the colonial courtroom started enlarging the realm of what it understood as "civil rights," it began delegitimizing the *panchayat*'s definitional prerogative on what constituted custom. In material terms this meant a decreasing legal flexibility afforded to married women and an elevated importance given to scripture. In response, newspapers and social reform conferences rallied around the *panchayat* as a legitimate arbiter of Indian custom in the 1880s. As such, for Denault the *panchayat* represented a space in which competing visions of an Indian social order could appear. This analysis not only reframes our historical understanding of the *panchayat* and its place within larger historiographical debates, but also develops a thicker legal historical context to the landmark Rukhmabai case in 1884, widely understood as a pivotal moment in the subsequent age of consent reform in 1891. Denault concludes by pointing toward the way these nineteenth-century histories of custom and law have left visible marks on the condition of postcolonial India, a nod toward themes later taken up in Saumya Saxena's piece.

The final essay continues to interrogate the theme of the law's ability to realign religion, looking specifically at postcolonial India. Saxena addresses the politics of codification of religious laws postindependence. She argues that family law emerged as a particularly hospitable arena for conversations between religious and legal regimes to institute a normative framework that could govern the domestic lives of citizens. She demonstrates how the codification of religious personal laws permitted the Indian state to enter into intimate dialogue with citizens, which was largely mediated through religion. Thus, through the process of codification, the state also secured a monopoly over determining what constituted religion, as well as the right to determine the validity and scope of religious practices. While the conflicts that arose went far beyond the realm of law, personal law acquired the ability to absorb and direct political conflict to the legal register, and in this way became instrumental to Indian democracy.

The article also questions the common practice of writing histories of legislation rather than writing the history of law. It analyzes the prehistory of law on Muslim divorce to suggest that the current debate on Muslim personal law had in fact been preempted in the 1960s itself. It illustrates how the rhetoric of legal reform dominated the political discourse of postindependence, as codification of religious practices became a yardstick for measuring the success of Indian democracy. Saxena reveals a conversation between stakeholders and the state over religious personal laws that was enabled by committees, commissions, and consultations, all instituted to serve as a buffer zone for tackling challenges of legal pluralism. These committees became the paradigm for legal and democratic change by "storing" legislative bills that were not immediately enacted. By consolidating the category of religion in statutory form, the state enabled itself to mediate the extent of the religiosity of an individual. This was not merely a categorization of the civil or criminal aspects of religion but was fundamentally about the monopolization of the right to determine these distinctions.

Since this essay was written, there have been a number of modifications owing to the ongoing debates on triple talaq. As the issue of personal law has once again landed in a commission for a yet another "comprehensive study," this essay provides an important historical framing for the current debates.

These essays, therefore, offer a loose chronological path across modern Indian history, raising important questions concerning religion, custom, sovereignty, and power recast alongside one another, in both the colonial and postcolonial Indian context, with the intention of reinvigorating critical conversations within legal historical scholarship across these themes.

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